Supreme Court, U.S.
FILED
APR 24 2000
CLERK

(7)

Original Action No. 129

In The Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v.

STATE OF MARYLAND,

Defendant.

On Motion for Leave to File Bill of Complaint

BRIEF AMICUS CURIAE OF LOUDOUN COUNTY, VIRGINIA, OF LOUDOUN COUNTY SANITATION AUTHORITY AND PRINCE WILLIAM COUNTY SERVICE AUTHORITY IN SUPPORT OF MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

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15 pp

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I. INTRODUCTION, STATEMENT OF INTEREST OF AMICI, AND SUMMARY OF THE ARGUMENT

The Fairfax County Water Authority ("FCWA") intends to construct a drinking water intake structure in the channel of the Potomac River because the present intake near the Virginia shore is subject to increased turbidity that raises treatment costs and creates a greater risk of disease for consumers of treated water. FCWA's plans to do so have set in motion a series of events that have led Maryland to assert suzerainty over the riparian rights of Virginia, its subdivisions, instrumentalities, and citizens in the waters of the Potomac River.

A. Interest of Amicus Loudoun County.

Loudoun County is vitally interested in seeing that Virginia's motion to file a bill of complaint is granted. It is permitted to appear as an amicus curiae because it is a county appearing through its authorized law officer, Rule 37(4), Rules of the United States Supreme Court, and because it has obtained the consent of the parties. Rule 37(2)(a).[1]

The current population of Loudoun County is approximately 136,845, representing an increase of 51% over the 1990 census. That population is exposed to health risks and higher water costs as long as Maryland continues to block FCWA's efforts to exercise the rights of Virginians to

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[1] Letters of Consent from Virginia and Maryland have been lodged with the Clerk. No counsel for a party authored this brief in whole or in part. No person or entity other than the amici curiae, their employees and their counsel made any monetary contribution to the preparation or submission of the brief. Counsel for Virginia was afforded the courtesy of previewing and commenting on the drafts of the brief prior to filing.

erect structures in the Potomac River that do not impede navigation. Loudoun County's planning process to meet its future obligations includes a study of plans to build its own water treatment plant and to construct an intake structure in the river. This process is being impeded by Maryland's actions announcing that it will refuse permits for years at a time and might do so forever depending upon what its studies show. A deferral of this case would be tantamount to a decision upholding Maryland's unwarranted claims to control Virginia's riparian rights without a hearing or a merits-based decision.

B. Interest of Amici Loudoun County Sanitation Authority and Prince William County Service Authority.

The Loudoun County Sanitation Authority ("Loudoun Authority") and the Prince William County Service Authority ("Prince William Authority") join with Loudoun County to brief the principle that deferring a decision on the issues raised in Virginia's motion would have the practical effect of sustaining Maryland's unwarranted claims over the Potomac River without a hearing and without a merits-based decision. Here, justice delayed is truly justice denied. The interests of the authorities, who also have obtained consent of the parties to appear as amici, are substantial.

1. Interest of the Loudoun Authority.

The Loudoun Authority is a public body politic and corporate and is also an instrumentality and political subdivision of the Commonwealth of Virginia authorized by Va. Code Ann. § 15.2-5114. The Loudoun Authority was created by action of the Board of Supervisors of Loudoun

County pursuant to that authority and was chartered by the State Corporation Commission on May 27, 1959.

The Virginia Water and Waste Authorities Act (the "Act") and the Loudoun Authority's Articles of Incorporation provide that the Loudoun Authority is authorized to acquire, construct, improve, operate and maintain a water system for supplying and distributing water in the county. Loudoun County has imposed the responsibility upon the Loudoun Authority to meet the water needs of the citizens of Loudoun County. While the Loudoun Authority currently serves Eastern Loudoun County, its service area includes all of the unincorporated areas of the County's approximately 517 square miles. The incorporated towns within the County operate water supply systems independently of the Authority.

The Loudoun Authority has contracted to purchase a substantial quantity of water from FCWA having acquired 20 million gallons per day of capacity, with the right to acquire additional capacity. In 1998, the Loudoun Authority actually purchased 1.5 billion gallons of water from the FCWA. In 1999, the Authority purchased 1.9 billion gallons of water from the FCWA.

As a consequence, residents of Loudoun County are being exposed to the health risks identified in Virginia's motion, arising from the higher turbidity of water taken at the present shoreline intake point. The Authority is also paying higher prices for water treatment to deal with that higher turbidity.

The Loudoun Authority has engaged in a planning process to determine how to meet its obligation to supply the future water needs of Loudoun County and has acquired a water treatment plant site on the banks of the Potomac River. As a riparian owner, the Loudoun Authority is studying

plans to withdraw water from the Potomac River from its own intake system upon the non-tidal part of the Potomac River bordering the County. Maryland's claims of authority to regulate Virginia's use of the river stand as a substantial impediment to the Authority's ability to discharge its responsibilities both in the present and the future.

2. Interest of the Prince William Authority.

The Prince William Authority is also a public body politic and corporate, organized pursuant to the provisions of the Act. It too is an instrumentality and political subdivision of the Commonwealth of Virginia. The Prince William Authority was created by action of the Board of Supervisors of Prince William County and was chartered by the State Corporation Commission on January 21, 1983. The Prince William Authority bears the responsibility to supply most of the water needs of Prince William County and is authorized to acquire, construct, improve, extend, operate and maintain water systems in that county.

Like the Loudoun Authority, the Prince William Authority purchases most of its treated water from FCWA, much of it derived from the FCWA Potomac intake. In 1998, the Prince William Authority purchased 4.74 billion gallons of water from the FCWA. In 1999, the amount purchased was 4.88 billion gallons. As a consequence, some residents of Prince William County are being exposed to the health risks identified in Virginia's motion and the Prince William Authority is paying higher wholesale prices for treated water.

The Prince William Authority is by far the largest wholesale purchaser of water in the FCWA system. The Prince William Authority has contracted with FCWA to purchase up to 13.65 billion gallons of water per year from

FCWA. The Prince William Authority relies on FCWA as the principal supply source for water to the Prince William Authority now and in the future. The Prince William Authority has designed its system based upon reliance on FCWA's ability to withdraw water from the Potomac intake. The Prince William Authority has expended or committed in excess of $100 million for the treatment plant capacity and transmission systems necessary to meet the needs of its customers within Prince William County. The Prince William Authority continues to design systems and expend funds incorporating FCWA to meet the current and future needs of its customers and others citizens of Prince William County.

Ultimately, the Prince William Authority will require in excess of 22 billion gallons per year of treated water from FCWA. Much of this required treated water will come from the FCWA Potomac intake. The action by Maryland to attempt to regulate Virginia's use of the Potomac River places the ability of the Prince William Authority to meet its responsibilities to current and future users of the system in serious jeopardy. As a consequence of the claimed right by Maryland to block Virginia's use of the River, the Prince William Authority will be forced to consider alternative supply sources to meet the current and future needs. The development of alternative sources is a long-term and extremely expensive solution for the Prince William Authority. The hundreds of millions of dollars required to develop an alternative supply source are unnecessary costs that were not anticipated by the Prince William Authority under its current operating scenario. The additional requirement will add a significant financial burden to the present and future customers of the Prince William Authority system and will ultimately have a detrimental impact on the economic growth of Prince William County as a whole.

C. Introduction and Summary of Argument.

By virtue of the Compact of 1785 between Virginia and Maryland, 1785 Va. Acts c. XVII, codified in part at Va. Code Ann. § 7.1-7, 1786 Md. Laws c. 1; the Black-Jenkins Award of 1877, Va. Code Ann. § 7.1-7, Act of March 3, 1879, ch. 196, 20 Stat. 481, 483; this Court's decision in *Maryland v. West Virginia*, 217 U.S. 577 (1910), the Potomac River Compact of 1958, Va. Code Ann. § 28.2-1001, Md. Code Ann., Nat. Res. § 4-306 (1999 Supp.), Pub. L. No. 98-893, 76 Stat. 797 (1962); the Low Flow Allocation Agreement of 1978, Motion App F, and the Water Supply Cooperation Agreement of 1982, Motion App G, it is clear that Virginia has the right to build structures in the river that do not obstruct navigation and that Virginia has retained its riparian rights in the Potomac, including a right to withdraw and use water without the prior consent of Maryland.

Maryland requires that anyone seeking to construct a facility to withdraw water from the Potomac River obtain permits including a waterway construction permit and a water appropriation permit. Maryland conditions the issuance of such permits on a showing that the appropriation, in Maryland's view, is "necessary."

FCWA submitted state and federal permit applications on January 4, 1996. Although Maryland conceded that FCWA's proposed intake will not harm any aesthetic, boating or fishing interests, Motion App N, the Maryland waterway construction permit has been withheld pending consideration of whether the new intake is necessary. Motion App. P. Although administrative proceedings involving Maryland and FCWA have continued since 1997, no administrative officer has been willing to rule on FCWA's claim that Maryland lacks the right to condition Virginia's rights on a finding of necessity. *Id.* at 144a. Instead, the issue has become politically charged, with a

number of Maryland officials publicly stating that Maryland's permitting process should be used to regulate development in Northern Virginia.

On November 30, 1999, the Attorney General of Virginia wrote to the Attorney General of Maryland demanding that Maryland either issue the permit or agree that permit approval is not required. On January 4, 2000, the Attorney General replied, asserting Maryland's putative power to regulate Virginia's riparian rights in the Potomac River. Motion App. S, T. Thereafter, the Maryland legislature passed the so-called Potomac River Protection Act in two forms. H.B. 395 purports to establish an indefinite moratorium on construction of new intakes in the Potomac. S.B. 729 does so for at least three years. The Governor of Maryland is expected to sign one of these bills. In either form, this legislation purports to prevent your amici from exercising their riparian right to withdraw water from the Potomac River.

The County and the Authorities submit that the existing dispute between Virginia and Maryland satisfies the traditional criteria for the exercise of original jurisdiction by this Court. The Commonwealth of Virginia now faces an ongoing challenge to its riparian rights. Border and water rights rest at the core of cases where this Court exercises its original jurisdiction, almost as a matter of course. In addition to its own sovereign rights, the Commonwealth of Virginia has clear standing as *parens patriae* to protect the public welfare and safety of its citizens.

This Court has previously exercised its original jurisdiction to construe riparian rights in the Potomac River. The problem here is that Maryland refuses to adhere to that which has been previously settled.

This suit is also appropriate because there is no other proper forum to resolve this serious dispute between sovereign states. Virginia is not a party to the administrative proceeding nor can it properly be required to undergo the indignity of intervening to litigate its claims in another state - particularly in a forum which at this stage of proceedings is not even a court but is instead an administrative agency without expertise in resolving legal claims of the dignity and delicacy involved here. Furthermore, Virginia and its subdivisions, authorities, and citizens other than FCWA are not parties to the Maryland proceeding and could acquire no rights against Maryland through that proceeding. Finally, now that Maryland has unequivocally asserted adverse rights against all of Virginia, far broader than the single permit at issue in the administrative proceeding, the necessity for an exercise of original jurisdiction is not fairly debatable.

II. VIRGINIA'S MOTION FOR LEAVE TO FILE A BILL OF COMPLAINT IS SUPPORTED BY THE DECISIONS OF THIS COURT DETERMINING WHEN TO EXERCISE ORIGINAL JURISDICTION.

The facts and circumstances of this case when judged against the original jurisdiction jurisprudence of this Court strongly support the motion of the Commonwealth of Virginia to file a bill of complaint.

While it is true that the Court has held that its original jurisdiction should be invoked sparingly, *Utah v. United States*, 394 U.S. 89, 95 (1962), the subject matter here is the traditional and historic subject matter of original jurisdiction--boundary disputes and water rights issues. Historically, interstate boundary disputes are the paradigm subject matter for original jurisdiction. Vincent L. McKusick, Discretionary Gatekeeping: The Supreme Court's Management of Its Original Jurisdiction Docket Since 1961,

45 Me. L. Rev. 185, 198 (1993). The Court has previously considered boundary issues involving the Potomac River. *See Maryland v. West Virginia*, 217 U.S. 577 (1910). Beginning early in this century, the Court has entertained original jurisdiction cases involving water rights and enforcement of contracts between states. McKusick, 45 Me. L. Rev. at 198. These same interests are at the core of the present dispute, which involves boundary issues, water rights and the enforcement of interstate compacts. As former Maine Chief Justice McKusick noted in his survey, 45 Me. L. Rev. at 199, the Court has continued almost invariably to accept traditional boundary disputes and water rights disputes between two or more states.

The Court has the power to exercise original jurisdiction when the issue framed by the pleadings presents a justiciable case or controversy within the meaning of Article III of the Constitution, and the facts alleged and found afford an adequate basis for relief according to accepted doctrines of common law or equity. *Texas v. Florida*, 306 U.S. 398, 405 (1939). There can be no question that this is an actual case of controversy between states. Maryland denies the right of Virginia to take water from the Potomac River without Maryland's permission. Virginia asserts that it has such a right. Here, Virginia seeks to require the State of Maryland to abide by the terms of interstate compacts between the states as previously construed by this Court.

A state has standing to sue when its sovereign or quasi-sovereign interests are implicated. *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976). Such is the case, as the Court recognized in *Pennsylvania v. New Jersey*, 426 U.S. at 665, in water rights disputes such as *Kansas v. Colorado*, 206 U.S. 46 (1907).

As the Court observed in *Kansas v. Colorado*, 185 U.S. 125, 141-42 (1902), a state is the proper party to represent and defend its citizens when their health and comfort is threatened through the acts of another state depriving those citizens of water rights. As in *Kansas v. Colorado*, 185 U.S. at 142, the action complained of here is state action and not the action of state officers in abuse or excess of their powers.

Not only are the constitutional and statutory requisites of the Court's original jurisdiction satisfied, but so are prudential and equitable limitations that the Court has imposed. *See Illinois v. City of Milwaukee*, 406 U.S. 91, 93-94 (1972). These considerations include the seriousness and dignity of the claim, and the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had. As the Court noted in *Ohio v. Wyandotte Chemicals, Inc.*, 401 U.S. 493, 500 (1971), underlying the constitutional grant of original jurisdiction was the belief that no state should be compelled to resort to the tribunals of another state for redress, due to the appearance, if not reality, of parochialism and partiality. Virginia's sovereign rights in the Potomac River are denied by the State of Maryland. Virginia is not a party to the state administrative process involving FCWA, and Virginia has interests that are far broader than FCWA's permit. Forcing Virginia to either intervene in or otherwise abide by the outcome of that proceeding would be inconsistent with the seriousness of the dispute and the dignity of the parties.

CONCLUSION

This case satisfies all of the requisites that the Constitution, the jurisdictional statute and the decisions of this Court have established for the exercise of original jurisdiction in this Court. Maryland's denial of Virginia's sovereign rights recognized by interstate compact and by a prior decision of this Court is precisely the kind of case for which the Court's original jurisdiction was ordained and in which it has been consistently exercised.

Respectfully Submitted,

LOUDOUN COUNTY, VIRGINIA, THE LOUDOUN COUNTY SANITATION AUTHORITY and THE PRINCE WILLIAM COUNTY SERVICE AUTHORITY

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